O'Brien & Gere Limited v. Business Software Alliance Doc. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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| O'BRIEN & GERE LIMITED,<br>Plaintiff,<br>v.<br>BUSINESS SOFTWARE ALLIANCE,<br>Defendant. | CIVIL ACTION<br><br>NO. ___________ |

**NOTICE OF REMOVAL**

Pursuant to Title 28 U.S.C. §§ 1331 and 1338, Defendant BSA Business Software Alliance, Inc. also known as Business Software Alliance ("Defendant"), by its undersigned counsel, hereby removes this action, with an express reservation of all defenses, from the Supreme Court of the State of New York, County of Onondaga, to the United States District Court for the Northern District of New York.

As grounds for this removal, Defendant states as follows:

1. On August 8, 2007, Plaintiff O'Brien & Gere Limited ("Plaintiff") commenced this action by filing a Summons and Complaint (the "Complaint") in the Supreme Court of the State of New York, County of Onondaga. The matter was designated as *O'Brien & Gere Limited v. Business Software Alliance*, Index No. 2007-4999. A true copy of the Summons and Complaint is attached as Exhibit "A".

2. On September 18, 2007, Defendant filed a Notice of Motion to Dismiss and for Sanctions ("Motion"). A true copy of that notice is attached as Exhibit "B".

3. On October 3, 2007, Plaintiff filed an Affidavit in Opposition to Motion and Memorandum of Law in Opposition to Motion. A true copy is attached as Exhibit "C".

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4. On October 8, 2007, Defendant filed a Reply in support of its Motion. A true copy of said Reply is attached as Exhibit "D".

5. On October 11, 2007, the Supreme Court of the State of New York, County of Onondaga, held a Hearing on Defendant's Motion. A true copy of the Transcript of that Hearing is attached as Exhibit "E".

6. On October 11, 2007, Plaintiff sent a proposed Order on Defendant's Motion. A true copy of said proposed Order is attached as Exhibit "F".

7. On October 15, 2007, Plaintiff sent a revised proposed Order as requested by the Court. A true copy of said revised proposed Order is attached as Exhibit "G".

8. On October 26, 2007, the Court signed an Order dismissing Defendant's Motion, which was filed with the Onondaga County Clerk's Office on October 29, 2007. A true copy of that signed Order is attached as Exhibit "H".

9. The Complaint, on its face, seeks a Declaratory Judgment "that the Plaintiff need not respond to the demands of the Defendant Business Software Alliance as set forth in the exhibits to this Complaint and further that the Defendant shall be restrained from further similar demands upon the Plaintiff and that the Plaintiff shall be granted the costs and disbursements of this action, including reasonable attorney's fees, together with such other and further relief as the Court deems just and proper." (Exhibit "A", p. 2-3 (the "Wherefore"/ "Relief" Clause of the Complaint).)

10. Despite the relief sought by the Complaint, Justice James P. Murphy of the Supreme Court of the State of New York, County of Onondaga, the Justice to whom the case is assigned, opined in the Hearing on October 11, 2007 that Plaintiff was seeking a Declaratory Judgment of Copyright Non-Infringement (Exhibit "E", Hearing Tr. 4:6-22, 5:1-8, 9:17-25, 10:1-

7, 11:12-25, Oct. 11, 2007), and Plaintiff's Counsel, the actual author of the Complaint, agreed. (Exhibit "E", Hearing Tr. 7:11-12, Oct. 11, 2007.)

11. This Court has Original Jurisdiction over the action by virtue of Exclusive Federal Jurisdiction over Copyright cases as provided in Title 28 U.S.C. § 1331 and § 1338.

12. Defendant received the Transcript for the Hearing on October 12, 2007.

13. The period for removal set out in 28 U.S.C. § 1446(b) having commenced on October 12, 2007, this Notice of Removal is timely filed.

14. Venue is proper in this Court pursuant to Title 28 U.S.C. § 112(b), § 1391, and § 1441, because the United States District Court for the Northern District of New York is the Federal Judicial District embracing the Supreme Court of New York, Onondaga County, where the State Court Action was originally filed.

15. This action is properly removable to Federal Court pursuant to Title 28 U.S.C. § 1331, § 1338, and § 1441.

16. A true and correct copy of this Notice of Removal has been served on Plaintiff's Counsel, and will be filed with the Clerk of the Supreme Court of the State of New York, County of Onondaga, 401 Montgomery Street, Syracuse, NY 13202.

WHEREFORE, Defendant removes this action to the United States District Court for the Northern District of New York.

Dated: November 2, 2007

Respectfully submitted,

Kenneth J. King, Esquire (KK 3567)
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Attorneys for Defendant,
BSA BUSINESS SOFTWARE ALLIANCE, INC., a/k/a BUSINESS SOFTWARE ALLIANCE

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* Motions to Admit *Pro Hac Vice* will be filed shortly.

# CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Notice of Removal, and attachments were served this 2nd day of November 2007, by Federal Express upon counsel for plaintiff at the following address:

Frank A. Bersani, Jr., Esq.
306 Syracuse Building
224 Harrison Street
Syracuse, NY 13202

Suzanne M. D'Amico, Esquire

Sworn to and subscribed before me
this 2 day of November 2007

Notary Public

SUSAN R. HILL
Notary Public, State of New York
No. 31-4910114
Qualified in New York County
Commission Expires Oct. 23, 2009